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**DEPARTMENT OF AGRICULTURE**

**Agricultural Marketing Service**

**7 CFR Part 1210**

**[Document Number AMS-FV-11-0031]**

**Watermelon Research and Promotion Plan; Importer Membership Requirements**

**AGENCY:** Agricultural Marketing Service, USDA

**ACTION:** Proposed rule.

**SUMMARY:** This rule proposes to amend the Watermelon Research and Promotion Plan (Plan) importer membership requirements to serve on the National Watermelon Promotion Board (Board). The Board recommended to eliminate the requirement that an importer import more than 50 percent of the total volume handled and imported in order to qualify as an importer member. This change would allow for additional parties to qualify as an importer member.

**DATES:** Comments must be received by [\[Insert date 30 days after date of publication in the Federal Register\]](#).

**ADDRESSES:** Interested persons are invited to submit written comments on the Internet at: <http://www.regulations.gov> or to the Promotion and Economics Division, Fruit and Vegetable Program, Agricultural Marketing Service (AMS), U.S. Department of Agriculture, (USDA) Room 0632-S, Stop 0244, 1400 Independence Avenue, S.W., Washington, D.C. 20250-0244; facsimile: (202) 205-2800. All comments should reference the docket number and the date and page number of this issue of the **Federal Register** and will be made available for public inspection in the above office during regular business hours or it can be viewed at <http://www.regulations.gov>. All comments received will be posted without change, including

any personal information provided. Please be advised that the identity of the individuals or entities submitting comments will be made public on the Internet at the address provided above.

**FOR FURTHER INFORMATION CONTACT:** Jeanette Palmer, Marketing Specialist, Promotion and Economics Division, Fruit and Vegetable Program, AMS, U.S. Department of Agriculture, Stop 0244, 1400 Independence Avenue, S.W., Room 0632-S, Washington, D.C. 20250-0244; telephone: (888) 720-9917; facsimile: (202) 205-2800; or electronic mail: Jeanette.Palmer@ams.usda.gov.

**SUPPLEMENTARY INFORMATION:**

This rule is issued under the Watermelon Research and Promotion Plan [7 CFR part 1210]. The Plan is authorized under the Watermelon Research and Promotion Act (Act) [7 U.S.C. 4901-4916].

**Executive Order 12866 and Executive Order 13563**

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated as “non-significant regulatory action” under section 3(f) of Executive Order 12866. Accordingly, the Office of Management and Budget (OMB) has waived the review process.

**Executive Order 12988**

In addition, this rule has been reviewed under Executive Order 12988, Civil Justice Reform. The rule is not intended to have retroactive effect.

The Act allows producers, producer-packers, handlers, and importers to file a written petition with the Secretary of Agriculture (Secretary) if they believe that the Plan, any provision of the Plan, or any obligation imposed in connection with the Plan, is not established in accordance with the law. In any petition, the person may request a modification of the Plan or an exemption from the Plan. The petitioner will have the opportunity for a hearing on the petition. Afterwards, an Administrative Law Judge (ALJ) will issue a decision. If the petitioner disagrees with the ALJ's ruling, the petitioner has 30 days to appeal to the Judicial Officer, who will issue a ruling on behalf of the Secretary. If the petitioner disagrees with the Secretary's ruling, the petitioner may file, within 20 days, an appeal in the U.S. District Court for the district where the petitioner resides or conducts business.

#### **Initial Regulatory Flexibility Act and Paperwork Reduction Act**

In accordance with the Regulatory Flexibility Act [5 U.S.C. 601-612], AMS has examined the economic impact of this rule on the small producers, handlers, and importers that would be affected by this rule.

The Small Business Administration defines, in 13 CFR part 121, small agricultural producers as those having annual receipts of no more than \$750,000 and small agricultural service firms (handlers and importers) as those having annual receipts of no more than \$7 million. Under these definitions, the majority of the producers, handlers, and importers that would be affected by this rule would be considered small entities. Producers of less than 10 acres of watermelons are exempt from this program. Importers of less than 150,000 pounds of watermelons per year are also exempt.

USDA's National Agricultural Statistics Service (NASS) data for the 2011 crop year was about 312 hundredweight (cwt.) of watermelons were produced per acre. The 2011 grower price

published by NASS was \$14.00 per hundredweight. Thus, the value of watermelon production per acre in 2011 averaged about \$4,368 (312 cwt. x \$14.00). At that average price, a producer would have to farm over 172 acres to receive an annual income from watermelons of \$750,000 (\$750,000 divided by \$4,368 per acre equals 172). Accordingly, as previously noted, a majority of the watermelon producers would be classified as small businesses.

Based on the Board's data, using an average of freight on board (f.o.b.) price of \$.164 per pound and the number of pounds handled in 2011, none of the watermelon handlers had receipts over the \$7.5 million threshold. Therefore, the watermelon handlers would all be considered small businesses. A handler would have to ship over 45.7 million pounds of watermelons to be considered large (457,317,073 times \$.164 f.o.b. equals \$7,500,000).

According to the Board, there are approximately 950 producers, 230 handlers, and 137 importers who are required to pay assessments under the program.

Based on the watermelon import assessments received for the year 2011, the United States imported watermelons worth over \$211 million dollars. The largest imports of watermelon came from Mexico which accounted for 89 percent of the total in 2011. Other suppliers of imported watermelon are Guatemala at 8 percent and Costa Rica at 1 percent. The remaining 2 percent of imported watermelon came from Nicaragua, Honduras, Panama, Vietnam, Canada, Dominican Republic, and Israel.

The Board's audit records show imports for the fiscal years 2009, 2010, and 2011 at \$754,760, \$746,043, and \$855,890 respectively. Based on this data, the three-year average of imports for watermelon totals \$785,564 (2,356,693 divided by 3). This represents approximately 30 percent of the total assessments paid to the Board. Currently, the Board membership distribution consists of 14 producers, 14 handlers, 8 importers, and 1 public member. A final

rule to increase the number of importers on the Board was published in the July 18, 2011, Federal Register [76 FR 42009].

The Watermelon Research and Promotion Improvement Act of 1993 amended the Watermelon Research and Promotion Act by adding importer members to the Board among other things. At that time the industry recommended that, in order to qualify as an importer member on the Board, an individual that both handles and imports watermelons may vote for importer members and serve as an importer member if that person imports 50 percent or more of the combined total volume of watermelons handled and imported by that person. A final rule was published in the Federal Register on February 28, 1995 [60 FR 10795] containing this and other amendments to the program.

At the time of this amendment there was a more clear division of roles among producers, handlers, and importers. In other words, those individuals that imported watermelons did not cross over into handling or producing watermelons as much as they do now. Since then, the industry has become more consolidated and of the 137 importers required to pay assessments 42 also handled watermelons and would be eligible to serve as either handler or importer member.

At its February 26, 2011, meeting, the Board voted unanimously, to modify the importer eligibility requirements to serve on the Board. The Board is having difficulty finding eligible importers to serve on the Board because of the requirement in the Plan that a person who both imports and handles watermelon will be counted as an importer if that person imports 50 percent or more of the combined total volume of watermelons handled and imported by that person. The Board voted to eliminate the 50 percent requirement or more of the combined total volume of watermelons handled and imported by a person to allow more individuals to become eligible to serve on the Board as an importer. Individuals that both handle and import would be allowed to

decide which part of the industry they would prefer to represent regardless of the volume handled or imported. The industry believes that this change would increase the importer representation on the Board by allowing more individuals to be eligible to serve. This action may also increase diversity representation on the Board.

The Board considered a second alternative by changing the 50 percent or more of the combined total volume of watermelons handled and imported by the person to 25 percent or more of the combined total volume of watermelons handled and imported by the person. However, the Board did not choose this option because they wanted to allow more importers to be eligible for nomination on the Board and therefore, they eliminated the percentage requirement. By eliminating the percentage requirement for the importer member, this will allow for smaller importer businesses to become eligible to serve as an importer member on the Board.

Section 1655(a) of the Act provides for referenda to be conducted to ascertain approval of changes to the Plan prior to going into effect. In order to implement the amendments to the Plan, the Secretary determines that the Plan has been approved by a majority of the producers, handlers, and importers of watermelon voting in the referendum. Accordingly, before these amendments are made to the Plan, a referendum will be conducted among eligible producers, handlers, and importers of watermelon.

In accordance with the Office of Management and Budget (OMB) regulation [5 CFR part 1320] which implements the Paperwork Reduction Act of 1995 [44 U.S.C. Chapter 35], have been assigned OMB number 0581-0093, which represents the information collection and recordkeeping requirements that are imposed by the Plan that have been approved previously, except that the background form, has been approved under OMB number 0505-0001.

USDA has not identified any relevant Federal rules that duplicate, overlap, or conflict with this rule.

We have performed this Initial Regulatory Flexibility Analysis regarding the impact of this amendment to the Plan on small entities, and we invite comments concerning potential effects of this amendment.

## **Background**

Under the Plan, the Board administers a nationally coordinated program of research, development, advertising, and promotion designed to strengthen the watermelon's position in the market place and to establish, maintain, and expand markets for watermelons. This program is financed by assessments on producers growing 10 acres or more of watermelons, handlers of watermelons, and importers of 150,000 pounds of watermelons or more per year. The Plan specifies that handlers are responsible for collecting and submitting both the producer and handler assessments to the Board, reporting their handling of watermelons, and maintaining records necessary to verify their reporting(s). Importers are responsible for payment of assessments to the Board on watermelons imported into the United States through the U.S. Customs Service and Border Protection. This action will not have any impact on the assessment rates paid by producers, handlers, and importers.

Membership on the Board consists of two producers and two handlers for each of the seven districts established by the Plan, at least one importer, and one public member. The Board currently consists of 37 members: 14 producers, 14 handlers, 8 importers, and 1 public member. A final rule to increase the number of importers on the Board was published in the July 18, 2011, Federal Register [76 FR 42009].

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Watermelon Research and Promotion Act by adding importer members to the Board among other things. At that time the industry recommended that, in order to qualify as an importer member on the Board, an individual that both handles and imports watermelons may vote for importer members and serve as an importer member if that person imports 50 percent or more of the combined total volume of watermelons handled and imported by that person. A final rule was published in the Federal Register on February 28, 1995 [60 FR 10795] containing this and other amendments to the program. At the time of this amendment there was a more clear division of roles among producers, handlers, and importers. In other words, those individuals that imported watermelons did not cross over into handling or producing watermelons as much as they do now. Since then, the industry has become more consolidated and of the 137 importers required to pay assessments 42 also handled watermelons and would be eligible to serve as either handler or importer member.

At its February 26, 2011, meeting, the Board voted unanimously, to modify the importer eligibility requirements to serve on the Board. The Board is having difficulty finding eligible importers to serve on the Board because of the requirement in the Plan that a person who both imports and handles watermelon will be counted as an importer if that person imports 50 percent or more of the combined total volume of watermelons handled and imported by that person. The Board voted to eliminate the 50 percent requirement or more of the combined total volume of watermelons handled and imported by a person to allow more individuals to become eligible to serve on the Board as an importer. Individuals that both handle and import would be allowed to decide which part of the industry they would prefer to represent regardless of the volume handled or imported. The industry believes that this change would increase the importer representation on the Board by allowing more individuals to be eligible to serve. This action



may also increase diversity representation on the Board.

Accordingly, the propose rule would amend sections 1210.321(d), 1210.363(b), 1210.404(g), and 1210.602(a) which reference importer eligibility requirements to be nominated to the Board and participation in a referendum. These sections would be revised to read as follows: a person who both imports and handles watermelon may vote for importer members and serve as an importer member if that person identifies that their vote will be considered as an importer.

For changes to the Plan to become effective, the proposed amendments to the Plan must be approved by a majority of producers, handlers, and importers of watermelon voting in a referendum. Accordingly, a referendum will be conducted among eligible producers, handlers, and importers of watermelon. Specific dates for the referendum will be announced at a later date.

A 30-day comment period is provided to allow interested persons to respond to this proposal. Thirty days is deemed appropriate so that the proposed amendments, if adopted, may be implemented to allow for the calendar year 2013 nomination meetings to take place before the appointments for new Board members are due. All written comments received in response to this rule by the date specified would be considered prior to finalizing this action.

#### **List of Subjects in 7 CFR Part 1210**

Administrative practice and procedure, Advertising, Consumer information, Marketing agreements, Reporting and recordkeeping requirements, Watermelon promotion.

For the reasons set forth in the preamble, Part 1210, Chapter XI of Title 7 is proposed to be amended as follows:

1. The authority citation for 7 CFR Part 1210 continues to read as follows:

Authority: 7 U.S.C. 4901-4916 and 7 U.S.C. 7401.

## **PART 1210—WATERMELON RESEARCH AND PROMOTION PLAN**

2. Revise § 1210.321 paragraph (d) to read as follows:

### **§ 1210.321 Nomination and selection.**

\* \* \* \* \*

(d) Nominations for importers positions that become vacant may be made by mail ballot, nomination conventions, or by other means prescribed by the Secretary. The Board shall provide notice of such vacancies and the nomination process to all importers through press releases and any other available means as well as direct mailing to known importers. All importers may participate in the nomination process: *Provided*, That a person who both imports and handles watermelon may vote for importer members and serve as an importer member if that person identifies that their vote be considered as an importer.

\* \* \* \* \*

3. Revise § 1210.363 paragraph (b) to read as follows:

### **§ 1210.363 Suspension or termination.**

\* \* \* \* \*

(b) The Secretary may conduct a referendum at any time and shall hold a referendum on request of the Board or at least 10 percent of the combined total of the watermelon producers, handlers, and importers to determine if watermelon producers, handlers, and importers favor termination or suspension of this Plan. The Secretary shall suspend or terminate this Plan at the end of the marketing year whenever the Secretary determines that the suspension or termination is favored by a majority of the watermelon producers, handlers, and importers voting in such referendum who, during a representative period determined by the Secretary, have been engaged

in the production, handling, or importing of watermelons and who produced, handled, or imported more than 50 percent of the combined total of the volume of watermelons produced, handled, or imported by those producers, handlers, and importers voting in the referendum. For purposes of this section, the vote of a person who both produces and handles watermelons will be counted as a handler vote if the producer purchased watermelons from other producers, in a combined total volume that is equal to 25 percent or more of the producer's own production; or the combined total volume of watermelon handled by the producer from the producer's own production and purchases from other producer's production is more than 50 percent of the producer's own production. *Provided*, That a person who both imports and handles watermelon may vote for importer members and serve as an importer member if that person identifies that their vote be considered as an importer. Any such referendum shall be conducted by mail ballot.

4. Revise § 1210.404 paragraph (g) to read as follows:

**§ 1210. 404 Importer member nomination and selection.**

\* \* \* \* \*

(g) Any individual who both imports and handles watermelons will be considered an importer if that person identifies themselves as an importer.

5. Revise § 1210.602 paragraph (a) to read as follows:

**§ 1210.602 Voting.**

(a) Each person who is an eligible producer, handler, or importer as defined in this subpart, at the time of the referendum and who also was a producer, handler, or importer during the representative period, shall be entitled to one vote in the referendum: *Provided*, That each producer in a landlord-tenant relationship or a divided ownership arrangement involving totally independent entities cooperating only to produce watermelons in which more than one of the

parties is a producer, shall be entitled to one vote in the referendum covering only that producer's share of the ownership: *Provided further*, That the vote of a person who both produces and handles watermelons will be counted as a handler vote if the producer purchased watermelons from other producers, in a combined total volume that is equal to 25 percent or more of the producer's own production; or the combined total volume of watermelon handled by the producer from the producer's own production and purchased from other producer's production is more than 50 percent of the producer's own production: *Provided further*, That a person who both imports and handles watermelons may vote and serve as an importer if that person identifies that their vote be considered as an importer.

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Dated: February 5, 2013

David R. Shipman  
Administrator

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